EDITOR'S NOTE

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90-1605

No:_____

Supreme Court, U.S.
FILED
APR 16 1991
OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

LIH Y.YOUNG,

Petitioner

v.

SECRETARY OF HEALTH &
HUMAN SERVICES

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Lih. Y. Young, Ph. D
1121 Pipestem Place
Rockville, MD 20854
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GENERAL DOCKET

UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

APPEAL FROM THE DISTRICT COURT

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Lih Y.Young,
Appellant
v.
Secretary of
Health & Human
Services

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20001

Popular Name:
Number of Case/Order Below:
Case Type: CV.US
JS-34: ❑ Yes ❑ No
Judge below: Revercomb(9061)

Date of Judg./order; o7/26-89[EOD 07-27-89]
USDC Offence/Nature of Suit Code: 2442
Date Docketed: 10-25-89
Date filed in Dist. Court: 01-05-88
Notice of Appeal Filed: 09-22-89
U.S. Mag: ❑ Direct ❑ Indirect

USA	IFP	FINANCIAL USDC RECIEPT

REMARKS

DATE	FILINGS-PROCEEDINGS
(V)10-25-89	Copy of notice of appeal and docket entries from clerk, USDC n-3)
(v)10-25-89	Docketing fee was paid in the District Court on 09-22-89.
(v)10-25-89	Order 86-6: Initial submissions and procedural motions due 11-24-89; dispositive motions due 12-11-89. Docketing statement was mailed to counsel for appellant.

(v)11-21-89	2-Appellant's docketing statement & initial submissions-(m-21)[15] Def Apx Yes
(v)12-20-89	5-Appellant's motion for extension of time to file statement of issues-(m-20) [15]
(v)12-20-89	Clerk's order that appellant's motion for extension of time to file statement of issues is granted and the Clerk is directed to file the lodged statement of issues.
(v)12-20-89	2-Appellant's statement of issues-(m-15)[per above order]
(v)12-29-89	2-Appellee's certificate as to parties, etc.-(m-29)[15]
(L)02-12-90	Clerk's order that this case

has been scheduled for oral argument on Friday, September 21,1990. The following schedule shall apply: Appellant's brief-5/25/90; appellee's brief-6/26/90; appellant's reply brief 7/10/90; deferred appendix-7/17/90; final brief-7/31/90.

(v)05/25/90 15-APPELLANT'S BRIEF-(m-25)

(v)06/26/90 7-APPELLANT"S BRIEF-(m-26)

(W)07/17/90 CERTIFIED ORIGINAL RECORD ON APPEAL (1 VOLUME); 3 volumes of transcript under 1 cover; [BIN]

(v)07/20/90 5-Appellant's motion to extend time to file joint appendix-(m-20)[8]

(v)07/24/90 5-Appellant's motion for extension of time to file

reply brief-(m-17)[8]

(N)07/25/90 Per Curiam Order that appellant's motion for extension of time to file the joint appendix, of the lodged joint appendix and of appellant's motion for extension to file reply brief is granted and the Clerk is directed to file the lodged appendix. It is further ordered that the motion to extend the reply brief deadline to 8/8/90 is denied. Appellant's reply brief shall be filed no later than 7/26/90. All other aspects of the February 12, 1990 briefing schedule shall remain if effect.

(v)	07/26/90	15-APPELLANT'S REPLY BRIEF - (m-26)
( )	07/25/90	7-Joint Appendix [BIN:]. FILED PER ORDER OF 07/25/90
( )	07/31/90	15-APPELLANT'S BRIEF (m-31) [BIN:].
(H)	07/31/90	15-Appellant's Errata sheet to joint appendix(m-31) [BIN:]
(H)	07/31/90	15-Appellee's BRief (m-31) [BIN:].
(S)		Letter to counsel advising of panel change to Cir. Judges Ruth B. Ginsburg, Sentel and Henderson.
(N)	08/31/90	Clerk's Order that the following times are allotted for the oral argument of this case: Appellant 10 minutes and Appellee 10 minutes. Only one counsel

per side will be permitted to argue. The panel considering this case will consist of Circuit Judges Ruth B. Ginsburg, Sentelle and Henderson.

(N)09/21/90 ARGUES BEFORE: Ruth B. Ginsburg, Sentelle and Henderson, Circuit Judges.

(cb)10/1/90 Judgement for the Court that the judgement of the District Court appealed from in this cause is hereby affirmed for the reasons set forth in the accompanying memorandum (see memo for details). The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any

timely petition for rehearing; Ruth Ginsburg, Sentelle, Henderson, CJs.

(v)10/30/90 5-Motion for applant's attorneys for leave to withdraw appearances and to extend appellant's time under rule 15 for seeking rehearing -(p-30) [1]

(R)11/05/90 5-Appellant's motions for leave to extend time and page limit for petition for rehearing and suggestion for hearing or rehearing en banc (m-5)[1]

(R)11/09/90 5-Appellant's motions for leave to approve appellant's motions in priority to appellant's attroneys; and to injunct appellant's attorneys to assist for the

	best interest of the appellant (m-9)[1].
(R)11/15/90	20-Petition for rehearing and suggestion for hearing or rehearing en banc (m-15) [1]
(R)11-15-90	20-APPELLANT'S APPENDIX (m-15) [1]
(R)11-16-90	5-Response of James H. Heller and Richard A. Salzman to appellant's motions for leave to approve appellant's motions in priority to appellant's attorney's and to injunvct appellant's attorneys to assist for the best interest of the appellant (m-15)[1]
(V)11-16-90	Per curiam order that, by the Court, the motion for leave to withdraw is granted

and the Clerk is directed to remove the firm of Kator, Scott and Heller, and all attorneys of the firm who have entered their appearance herein, from the docket as counsel for appellant and that appellant's motion for leave to exceed page limits is denied and that appellant's motion for a 6 month extension of time is denied and that appellant is granted to and including 12/5/90 in which to file a petition for rehearing and/or suggestion for rehearing en banc. The Clerk is directed to transmit copies of this

order to appellant by first class mail and by certified mail, return receipt requested. Ruth B. Ginsburg, Sentelle, and Henderson, CJ's.

(J)11-26-90 20-Appellant's motion for leave to obtain transcripts and tapes-(m-26)[1].

(J)11-28-90 20-Appellant's motions to file relevant documents including all of plaintiff exhibits, and to retain and preserve all records in this case as permanent records open to public in courts - (m-20)[1].

(J)11-28-90 Plaintiff exhibits, Vol. I-20, Vol. II-20, Vol. III-20 -[1].

(J)11-26-90 20-Appellant's motion for

leave to file futher information in suppoet of petition for rehearing and suggestion for hearing and rehearing en banc in six months from the receipt of all transcripts and tapes- (m-20)[1].

(J)11-21-90 Return receipt of certified mail for 11-16-90 order P424365892.

(J)11-30-90 Per curiam order that Appellant's motions for leave to approve appellant's motions in priority to appellant's attorneys and to injunct appellant's attorneys to assist for the best interest of the appellant it is ordered by the court that appellants

motions are denied. Ruth B. Ginsburg, Sentelle and Henderson, CJ's.

(J)12-05-90 20-Appellant's motions to file relevant documents in support of petition for rehearing and suggestion for hearing or rehearing en banc, and to retain and preserve all records in this case as permanent records open to public in courts - (m-5)[1].

(J)12-05-90 20-Appellant's motions to fle transcripts of trial to integrate with plaintiff exhibits, and to retain and preserve all records in this case as permanent records open to public in courts-(m-5)[1].

(J)12-05-90	20-APPELLANT'S COMPLETE TRANSCRIPTS OF TRIAL-(m-5)[1].
(J)12-05-90	20-APPELLANT'S APPENDIX F-(m-5)[1].
(J)12-05-90	20-APPELLANT'S APPENDIX G-(m-5)[1].
(J)12-11-90	Per curiam order denying motion for transcripts and tapes, dismissing as moot request for six month extension of time and granting all motions for leave to file further information, relevant documents, exhibits and transcripts (m-11).
(J)12-11-90	4-Transcript of Oral Argument dated September 21, 1990.[25].
(J)12-17-90	Per curiam order of

appellant's petition for rehearing, filed 11-15-90 and of the supporting material filed pursuant to the order of 12-11-90, it is ordered by the court that the petition is denied. R.B. Ginsburg, Sentelle, Henderson.

(J)12-17-90 Per curiam order that appellant's suggestion for rehearing En Banc and the supporting material filed pursuant to the order of 12-11-90, have been circulated to the full court and that the suggestion is denied. Wald, CJ, Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg,

Sentelle, Thomas Henderson

and Randolph, CJ's.

(LB)01-02-91 MANDATE ISSUED.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5387 September Term 1990
CA 88-0004

Lih Y.Young, Appellant

v.

Secretary of United States
Department of Health and Human Services

Appeal from the United States District Court for the District of Columbia

Before: RUTH B. GINSBURG, SENTELLE and HENDERSON, Circuit Judges.

JUDGMENT

This case was considered on the record from the United States District Court for the District of Columbia and on

the briefs and arguments of counsel for the parties. Upon full review of the issues presented, the court is satisfied that appropriate disposition of the appeal does not warrant a published opinion. See D.C. Cir. R.14 (c). For the reasons stated by the district court in its FIndings of Fact and Conclusions of Law filed July 26, 1989, and in the accompanying memorandum, it is

ORDERED AND ADJUDGED that the judgment from which this appeal has been taken be affirmed.

The Clerk is directed to withold issuance of the mandate herin until seven days after disposition of any timely petition for rehearing. See D.C. Cir. R. 15(b)(2).

Per Curiam
FOR THE COURT:
Constance L. Dupre, Clerk

(No Letter Head)

Young v. Sec'y, United States Dep't of Health and Human Services.

No. 89-5387

M E M O R A N D U M

Following a two-day bench trial, the district court returned findings of fact and conclusions of law adverse to plaintiff appellant Lih Y. Young on her charges against the Department of Health and Human Services (HHS) of 1) employment discrimination on account of her Chinese national origin, and 2) reprisals, all in violation of Title VII of the Civil Rights Act of 1964 as amended. The record fully supports the district court's judgment, which we therefore affirm.

The Discrimination Claim

Young maintains, in support of her race and national origin discrimination claim, that she was (1) given inaccurate data with which to work, and (2) denied essential training. She points, however, to no other employee who shared her concerns about, or difficulties with, the data; nor does the record otherwise bear out her assertions of serious inaccuracies.* Instead, testimony that the district court credited indicated that Young's concerns stemmed not from systematic inaccuracies in the data she

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* At oral argument, counsel for Young featured a point initially made in the reply brief. Counsel urged that a memo from Young's supervisor admitted that the date Young was provided contained serious inaccuracies. See Appellant's Reply Brief at 9 & n.2; Joint Appendix at 281-87. Even if we were to indulge this tardily-raised agrument, it would not affect our judgement. The memo, read in conjuction with the other evidence in the record, hardly indicates inaccuracies in the data so serious as to mandate a ruling that Young justifiably failed to complete her assignments.

was furnished, but from her own lack of comprehension of the data base. See Joint Appendix at 36-40 (Bordes); 58 - 59 (Morris); 60 - 61 (Weder); 65 (Rolston).

In short, it is a question of fact whether any deficiencies in the data justified Young's failure to complete her assignments. The trial judge resolved the question reasonably in light of the evidence. His resolution is not vulnerable to attack as "clearly erroneous." See Fed. R. Civ. P. 52(a) ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside [on appeal] unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.").

In short, it is a question of fact whether any deficiencies in the data

justified Young's failure to complete her assignments. The trial judge resolved the question reasonably in light of the evidence. His resolution is not vulnerable to attack as "clearly erroneous." See Fed. R. Civ. P. 52(a) ("Findings of fact, whether based on oral or documentary evidence. His resolution is not vulnerable to attack as "clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.")

Regarding training, Young emphasizes that, despite frequent requests, she was not given training in advanced SPSS (SPSS-X) techniques until November 1985, by which time she had already received several unfavorable evaluations. Although she was eventually authorized to receive this training, Branch Chief Bordes

maintained that Young's job did not require SPSS-X familiarity. See Joint Appendix at 318. Indeed, through much of Young's stay at the office of Family Assistance, she was not required to use the computers for data retrieval: during her last projects (through April 1985), she was asked only to analyse data that others had retrieved, and during her last projects (from November 1985 to her termination in June 1986), she was asked only to prepare a plan of how she would address her assignments. Young's claim that SPSS-X training was essential to satisfactory performance of the work she was assigned thus draws scant force from the record.

We note, moreover, that because Young did not establish that SPSS-X training was essential to her job performance, the reasons why Branch Chief Bordes refused

her requests for such training are scarcely relevant. Much of Young's "pretext" argument on the training issue, however, hinges on her claim that Bordes's stated reasons for denying that training were not credible. See Brief for Appellant at 7-8, 20-21; Appellant's Reply Brief at 3 & 4 n.3.

The Reprial Claim

The district court had before it on this branch of Young's complaint two conflicting interpretations of the evidence: Young's narrative of reprisal, and HHS's counternarraive of employee incompetence and recalcitrance. Each of the alleged acts of reprisal could be understood, at least equally well, as a response to Young's failure timely to submit completed work product over a two-year period.

Young's attack on the trial court's

disposition of this claim is more formal than substantive. She contends, first, that the district court failed to make specific fact findings to support its rejection of her reprisal claim. The court's opinion makes clear, however, that it credited HHS's witnesses and interpretation of the evidence; our cases have not required the district court to recite the evidence; our cases have not required the district court to recite the evidence it discredited. See De Medina v. Reinhardt, 686 F. 2d 997, 1011-12 (D.C. Cir. 1982) (affirming finding of no discrimination althogh trial court made no mention whatsoever of plaintiff's evidence).

Second, Young faults the district judge for indicating that she had not established a prima facie case. Once a Title VII case has been fully tried on the

merits, however, the essential question is not whether plaintiff has adduced some evidence on each element of a prima facie case, but whether the court's ultimate finding of no discrimination, or no retaliation, should be disturbed. See United States Postal Service Board of Governors v. Aikens, 460 U.S. 711, 713-15 (1983); Mitchell v. Baldrige, 759 F. 2d 80, 83-84, 88 (D.C. Cir. 1985). McKenna v. Weinberger, 729 F. 2d 783, 791 (D.C. Cir. 1984). Even if Young's EEO complaint timing evidence, considered in isolation, might support an inference of retaliation, the final decision properly rested on the full history of her employment relation. HHS introduced abundant evidence of Young's work failure --evidence that the district court rationally credited as the reason for her dismissal. On the record made at trial, we can hardly gainsay the

district court's conclusion that

> [t]he severity of the adverse actions increased in relation to the plaintiff's poor quality of work, not in relation to the plaintiff's protected activity. D.D.C. Findings of Fact and Conclusions of Law, filed July 26, 1989, at 12.

Because the proof made that conclusion at least a permissible one, the district court's judgment warrants our approbation.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5387 September Term, 1990

USDC Civ. No. 88-0004

Lih Y. Young,

Appellant,

v.

Secretary of Health & Human Services

Filed Dec 17 1990

CONTANCE L. DUPRE

CLERK

BEFORE: Ruth B. Ginsburg, Sentelle and Henderson, Circuit Judges

ORDER

Upon consideration of appellant's Petition for Rehearing, filed November 15, 1990, and of the supporting material filed pursuant to the order of December 11,

1990, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY:

Robert A. Bonner

Deputy Clerk

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No 89-5387 September Term, 1990

USDC Civ. No. 88-0004

Lih Y. Young,

v. Appellant,

Secretary of Health

& Human Services Filed Dec 17, 1990

CONSTANCE L. DUPRE
CLERK

BEFORE: Wald, Chief Judge; Mikva, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle, Thomas, Henderson and Randolph, Circuit Judges

O R D E R

Appellant's Suggestion For Rehearing En Banc and the supporting material filed pursuant to the order of December 11, 1990, have been circulated to the full Court. No member of the Court requested the taking of a vote theron. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam

FOR THE COURT

CONSTANCE L. DUPRE, CLERK

BY:

Robert A. Bonner

Deputy Clerk

Circuit Judges Silberman and Thomas did not participate in this matter.

November 16, 1990

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5387

September Term, 1990

USDC Civ. No. CA 88-0004

Lih Y. Young,

Appellant,

v.

Secretary of Health & Human Services

BEFORE: Ruth B. Ginsburg, Sentelle and Henderson, Circuit Judges

ORDER

Upon consideration of the motion of attorneys for appellant for leave to

withdraw and of appellant's pro se motions for leave to extend time and page limits for a petition for rehearing and/or suggestion for rehearing en bac it is

ORDERED, by the Court, that the motion for leave to withdraw is granted and the Clerk is directed to remove the firm of Kator, Scott and Heller, and all attorneys of the firm who have entered their appearance herein, from the docket as counsel for appellant. it is

Further Ordered, by the Court, that appellant's motion for leave to exceed page limits is denied and it is

Further Ordered, by the Court, that appellant's motion for a six month extension of time is denied. it is

Further Ordered, by the Court, on its own motion, that appellant is granted to and including December 5, 1990 within which to file a petition for rehearing

and/or suggestion for rehearing en banc.

The clerk is directed to transmit copies of this order to appellant by first class mail and by certified mail, return receipt requested.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY:

Robert A. Bonner

Deputy Clerk

December 11,1990

UNITED STATES COURT OF APPEAL

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 89-5387 September Term, 1990

CA 88-0004

Lih Y. Young,

Appellant,

v.

Secretary of Health & Human Services

BEFORE: Ruth B. Ginsburg, Sentelle and Henderson, Circuit Judges

ORDER

The following matters are currently pending before the Court:

(1) Appellant's Petition for Rehearing and/or Suggestion for Rehearing en banc, filed November 15, 1990.

(2) Appellant's Motions for Leave to Obtain Transcripts and Tapes, filed November 26, 1990.

(3) Appellant's Motion for Leave to File Further Information in Support of Petition for Rehearing and Suggestion for Hearing and Rehearing En Banc in Six Months from the Receipts of all Transcripts and Tapes, filed November 26, 1990.

(4) Appellant's Motions to File Relevant Documents Including all of Plaintiff Exhibits, and to Retain and Preserve all Records in This Case as Permanent Records Open to Public in

Courts, filed November 28, 1990.

(5) Appellant's Motions to File Relevant Documents in Support of Petition for Rehearing and Suggestion for Hearing or Rehearing En Banc, and to Retain and Preserve all Records in This Case as Permanent Records Open to Public in Courts, filed December 5, 1990.

(6) Appellant's Motions to File Transcripts of Trial to Integrate with Plaintiff Exhibits, and to Retain and Preserve all Records in This Case as Permanent Records Open to Public in Courts, filed December 5, 1990.

Upon consideration of the foregoing it is

ORDERED, by the Court, that the

motion to obtain transcripts and tapes (Motion No. 2) is denied. it is

FURTHER ORDERED, by the Court, that appellant's motions for leave to file relevant documents, and for other relief, (Motion No. 4 and 5) are granted and the Clerk is directed to file all of appellant's documents submitted with these motions. It is

FURTHER ORDERED, by the Court, that appellant's motion for leave to file transcripts, and for other relief, (Motion No. 6) is granted and the Clerk is directed to file the lodged transcripts submitted by appellant.

The parties will be promptly advised of whatever rulings the Court may enter concerning the petition for rehearing and the suggestion for rehearing en banc.

Per Curiam

FOR THE COURT:
CONSTANCE L. DUPRE , CLERK

BY:

Robert A. Bonner

Deputy Clerk

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

FILED

JULY 26, 1989

JAMES E. DAVEY,

CLERK

LIH Y. YOUNG

Plaintiff,

v.

SECRETARY, DEPARTMENT OF
HEALTH AND HUMAN SERVICES

Defendent,

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case involves claims by the Plaintiff that she was illegally discriminated against and terminated by the Department of Health and Human Services in violation of Title VII of the

Civil Rights Act of 1964 as amended. Plaintiff seeks back pay, reinstatement, promotions and expungement from her records of all negative documents resulting from this discrimination.

I. FINDINGS OF FACT

Plaintiff Lih Y. Young is a citizen of the United States and a resident of Maryland. She was born in China and has received a Masterts degree and a Ph.D degree here in the United States. Plaintiff applied for a position at the State Data and Programming Characteristics Branch (Branch), Division of Research, Evaluation and Statistics, Office of Policy Evaluation, office of Family Assistance, (OFA), Social Security Administration, Department of Health and Human Services. Plaintiff was accepted for the position of Program analyst GS-

345-12. and begin work on April 30, 1984.

The OFA does extensive work with the Aid for Dependent Children (AFDC) Program. AFDC provides financial assistance and other necessary services to at-risk families with dependent children. The Branch conducts extensive documentation and research pertaining to the administration and operational needs of the AFDC program.

GS-12 program analyst have eight essential work elements or Generic Job Tasks (GJT) they are expected to be capable of performing. The GJT's are designated differently depending on the level of importance they represent in the overall performance of the program analyst's work. Two of the eight GJT's are designated as "critical" for the program analyst position: GJT 68, "Prepares memos, reports and other written

work product" and GJT 3, "Analyses data and/or systems". The GS-12 program analyst is expected to work independently and to initiate research and draft reports pertaining to relevant data and information. The plaintiff worked under the supervision by the Branch Chief, Paul Bordes. Supervision by the Branch Chief is intended to be limited to assigning general objectives and occasionally providing advice regarding the most efficient way to achieve those objectives. After receiving an assignment the GS-12 program analyst is expected to develop a plan for how to carry out the assignment. Using computer databases, and following a premeditated approach, the program analyst conducts statistical analyses of data produced by the computer and writes a preliminary report. The preliminary report is then reviewed by the Branch

Chief and a decision is made as to whether further research and analysis is warranted.

In an effort to familiarize the plaintiff with the AFDC program, the Branch computer and databases, Mr. Bordes assigned the plaintiff to study background material and conduct descriptive analyses. The plaintiff complained that she was having problems with the data and difficulty understanding how to use the Branch program. After several unsuccessful attempts to reconcile the plaintiff, Mr. Bordes assigned Ms.Morris, one of the team leaders, to take the plaintiff's data requests and program them into the computer and extract data and information for the plaintiff. The plaintiff was then expected to conducted the analysis of the data and prepare a written report. However, the plaintiff

complained that the data produced through Ms. Morris' program searchs were not accurate and did not remain consistent from one query to the next. Ms. Morris explained to the plaintiff that the data was accurate and that any differences in output were due to changes in the plaintiff's requests as opposed to some external manipulation as contended by the plaintiff. The plaintiff has not shown that the data in question was in fact inaccurate.

Ms. Morris, on several occassions, questioned the plaintiff's requests for information because they did not appear to bear a rational relationship to any branch to any branch objectives. Ms. Morris expressed these concerns to Paul Bordes.

After several unsuccessful meeting between Ms. Morris, Paul Bordes and the plaintiff, Mr. Bordes requested that the

plaintiff prepare a memorandum identifying the problems she was having with the computer output. Plaintiff produced the memorandum and Mr. Bordes personally responded to each point raised in the plaintiff's memorandum. When plaintiff continued to complain about the data Mr. Bordes decided to personally assume responsibility for the plaintiff and asked her to report directly to him. Following the plaintiff's completion of training in SPSS (Statistical Package for the Social Sciences) the program aspect of her job was returned to her control by direction of Paul Bordes.

The plaintiff was again reviewed by Mr. Bordes in late April of 1985. The plaintiff was advised by Mr. Bordes that she was not performing satisfactorily and needed to improve her data analysis skills. Plaintiff appealed this review to

Mr. Bordes' supervisor, Howard Rolston, Director of the Division of Research and Evaluation. Mr. Rolston reviewed the plaintiff's complaint and statistical evidence as well as Mr. Bordes' response to the plaintiff's complaint. Mr. Rolston found no problem with data which should further inhibit the plaintiff from conducting and completing her assignments.

Following Mr. Rolston's review the plaintiff continued to miss deadlines and complain about the computer data. Mr. Bordes asked, on several occasions, that the plaintiff submit specific written questions regarding her assignments. Plaintiff responded to this requests by refering Mr. Bordes to her previous memorandum of complaint. Mr. Bordes explained to the plaintiff that referring to a previous memorandum that he had previously responded to was unsatisfactory

and that if the plaintiff was confused abused any particular portion of his response she should identify those areas and ask further questions to clarify any uncertainty. Mr. Bordes expressly directed the plaintiff that her work needed improvement, emphasizing that producing analyses and written reports were critical elements to her success. Mr. Bordes noted the plaintiff's unsatisfactory performance in his written report. Again, the plaintiff was dissatisfied with her progress review and appealed to Mr. Rolston. Mr. Rolston reviewed the appeal and stated that he agreed with Mr. Bordes' findings.

Following a minimally satisfactory performance rating (Level I) for her appraisal period from October 1, 1984 to September 30, 1984, Mr. Bordes placed the plaintiff that she was performing at a

minimally satisfactory level in two critical GHT areas: GJT # 68 and GJT # 3.

The plaintiff failed to comply with Mr. Bordes' instructions and did not submit several assignments when requested. This led to the plaintiff being placed on a 3 day suspension. By March 4, 1986 the plaintiff had still not completed an assignment that was given to her on November 1, 1985 and originally due on November 7, 1985. Further, plaintiff did not submit assignments due March 12, March 21, and April 2, of 1986. On June 12, 1986, Mr. Bordes and Mr. Rolston fired the plaintiff, effective June 13, 1986, for unsatisfactory performance.

II. CONCLUSIONS OF LAW

Discrimination

The Supreme Court has articulated the appropriate analysis for a claim brought

under Title VII of the Civil Rights Act of 1964 in McDonnell Douglas Corp v. Green 411 U.S. 792 (1973) and Texas Department of Community Affairs v. Burdine 450 U.S. 428 (1981). First, in a claim alleging racial employment discrimination complaint has the burden of establishing a prima facie case by the preponderance of the evidence. Second, if the plaintiff establishes a prima facia case, the burden of proof shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, if the defendent can carry this burden of proof then the burden shifts back to the plaintiff to show that the reason given by the defendant was not in fact the true reason, but merely a pretext or disguise for discrimination.

The Court takes note of the fact that

the McDonnell Douglas case was a hiring discrimination dispute, while the present case involves the discipline and eventual removal of the plaintiff after being hired. However, the Supreme Court noted in McDonnell that "[t]he facts necessarily applicable in every respect to differing factual situations." (McDonnell Douglas, 782 n. 13 supra).

The Courts notes establishing a prima facie case in a Title VII claim is not an onerous burden. The Supreme Court clarified that burden in Furnco Construction Corp. v. Waters 438 U.S. 567, 577 (1987).

> "A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors".

The Supreme Court further clarified the definition of the McDonell Douglas "prima facie case" in Teamsters v. United States 431 U.S. 324, 358 (1976). To establish the prima facie case "any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act." Therefore, the plaintiff merely needs to produce enough evidence to create an inference of discrimination. The prima facie case is only a threshold burden designed to screen the most common non-meritorious discrimination claims. Teamsters 358, and n. 44 supra. This allows the Court to proceed to the deeper and more important analysis of whether discrimination was in fact the basis of the adverse action(s). To defeat the

inference, if established,the defendent is required only to show "some legitimate non-discriminatory reasons" for the contested action(s).

The Court finds in the present case that the plaintiff has established an inference sufficient to create a prima facie case of discrimination. The plaintiff accomplished this by showing that (1) she was adversley affected by the defendant's personel actions, (2) she belongs to a protected class, (3) she has adequate educational training to perform the job experience (5) no other employees were experiencing the same personnel difficulties and (6) she alleged that the data she was assigned to work with was intentionally altered to her disadvantage.

The next step in the McDonnel Douglas analysis shifts the burden to the defendant to show some legitimate reason

for the adverse actions. The defendant raised convincing evidence that the plaintiff did not perform satisfactorily. The plaintiff was repeatedly tardy and failed to produce and complete assignments. The evidence showed (1) that the plaintiff was not responsive to her supervisor's requests to complete delinquent assignments, (2) the plaintiff was having difficulty understanding and performing basic tasks generic to her job requirements, (3) assignments given to the plaintiff were comparable in difficulty to other GS-12 program analysts, (4) the plaintiff was warned several times during performance reviews that she was not funtioning satisfactorily in several critical areas, (5) the plaintiff appealed negative performance reviews to Howard Rolston, Division Director, who found that the perfomance appraisals were accurate

and that plaintiff was not performing up to par. In sum, the Court finds adequate evidence to show a legitimate non-discriminatory reason for the defendant's actions.

Finally the plaintiff must demonstrate that the reasons given by the defendant for the removal were not in fact the real reasons, but were intended to cloak discriminatory intent.

The plaintiff attempted to convince the Court that she was a productive employee by reference to many examples of her work product. In the plaintiff's Proposed Findings of Fact several exhibits are specifically referenced to as examples of plaintiffs work product, and many other exhibits are also generally cited as examples of plaintiff's work product. First, the specific references to exhibits 35, 36, 37, 43, 44, and 134 deserve

examination. Exhibit No. 35 is a Correlation Analysis of approximately 5 full pages. Exhibit No. 36 is contained within exhibit No. 35. Exhibit No. 37 is a letter to the plaintiff from someone else, however, it is catagorized as an example of plaintiff's work product. Exhibit No. 43 and 44 are work related analyses amounting to approximately 40 pages. Exhibit No. 134 is a 2 page report. In total, there are approximately 50 pages of typed product. The other references to plaintiff's work product were listed as exhibits 44-144. Except exhibit 44 and 134, as mentioned above, the hundreds and hundreds of remaining pages of documents are not work related assignments. Instead, they are related to the plaintiff's job performance reviews. There are appeals, discrimination claims, numerous documents authored by other

individuals besides the plaintiff, EEOC review decisions, duplicates of other exhibits, complaint forms. OFA Employees GS-History Lists, and Notices of Appeal etc. Although the plaintiff may have produced hundreds of pages of documents during her approximate 25 months with OFA, the vast majority of these documents represented to be work product are related to the plaintiff's personnel difficulties as opposed to her work.

The plaintiff claims that Mr. Rolston, the second level supervisor, issued a memorandum with false and unjustified statements against the plaintiff; referencing plaintiff exhibit 46. Exhibit 46 is a memorandum by Mr. Rolston responding to the treatment and faulty data. Mr. Rolston explains in this memorandum that in his judgement, after reviewing Ms. Young's complaint and

material, there was nothing to prevent her from doing her analysis and there was no evidence that would lead him to change her interim progress review. The evidence did not demonstrate that any of the statements made in this memorandum are false or unjustified.

The plaintiff claims that she was subject to closer scrutiny than other employees citing plaintiff's exhibit 50 which is a note, apparently from Paul Bordes, directing the plaintiff to report her whereabouts if she was going to be absent from her work station for more than 15 minutes, not including the lunch hour. It may be that other employees were not directed to report their whereabouts, however, considering all of the problems the testimony that indicated no other employees were having similar problems, Mr. Bordes' closer scrutiny of the

plaintiff was not egregious or unjustified. The plaintiff states that she was singled out for low ratings and negative comments, but she put forward no evidence which showed that (1) other employees were having difficulty understanding data or completing assignments, and (2) these employees were receiving positive reviews notwithstanding their difficulties.

The plaintiff claims that she was not given adequate training to satisfactorily performs her job. However, the plaintiff had used the SPSS program before coming to the Branch and later participated in three training courses for the SPSS program package in 1985. According to Mr. Bordes, this was more training than most Branch employees received. Gay Morris also trained the plaintiff, however, according to Ms. Morris the plaintiff had difficulty

grasping the program and its relation to Branch objectives.

The plaintiff apparently wants the Court to find a pretext in the defendant's action by infering that the combination and frequency of the adverse actions must be due to discriminatory intent as opposed to the plaintiff's failure to perform satisfactorily. The Court credits the testimony which shows the reasons given were not a pretext for discrimination. The Court notes that the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated or retaliated against the plaintiff remains at all times with the plaintiff (Texas Dept. of Community Affairs v. Burdine 950 U.S. 248, 253 (1981).

Reprisal

The plaintiff must establish a prima

facie case for reprisal by showing (1) that plaintiff engaged in protected activity; (11) plaintiff was subsequenty affected by an adverse personal action of the defendant and (111) that there was a causal connection between the protected activity and the adverse action. McKenna v. Weinberger 729 F. 2d 783 (D.C. Cir. 1984).

In the present case the first two requirements are undisputed and both parties recognize their existence. The third requirement that there be a casual connection between the first two requirements is disputed. The Court finds that the plaintiff has failed to prove by the preponderence of the evidence that the defendants adverse actions are a result of the plaintiffs protected activity. The Court notes that before the plaintiff initated any protected activity the defendant had already acknowledged and

attempted to correct difficulties that the adverse actions increased in relation to the plaintiff was having in performing her job. These verity of the adverse actions increased in relation to the plaintiff's poor quality of work, not in relation to the plaintiff's protected activity.

Conclusion

The Court finds for the foregoing reasons that the plaintiff failed to prove discrimination or reprisal under Title VII of the Civil Rights Act of 1964 as amended.

Accordingly, Judgement will be entered for the defendant.

7/26/89

Date George H. Revercomb,

Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

LIH. Y. YOUNG, Civil Action No. 88-0004

Plaintiff,

vs.

SECRETARY, DEPARTMENT OF
HEALTH AND HUMAN SERVICES

Defendant.

Filed JULY 26,1989
JAMES E. DAVEY, CLERK

JUDGEMENT ORDER

In accordance with the Findings of Fact and the Conclusions of Law, Judgement is entered for the defendant.

7/26/89

Date George H. Revercomb. Judge

Joel P. Bennett, Esquire

1001 Connecticut Avenue, N.W.
Suite 501
Washington, D.C. 20036

Daniel Bensing, Esquire
Assistant U.S. Attorney
Judiciary Center Bldg, Room 4818
555 4th Street, N.W.
Washington, D.C. 20001

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT COLUMBIA CIRCUIT

No. 90-5195 September Term, 1990

Lih Y. Young,
Appellant

v.

Louis W. Sullivan, M.D., Secretary
HHS,et al.

FILED FEB 20, 1991
CONSTANCE L. DUPRE
CLERK

ORDER

This court entered an order on August 8, 1990 holding the above captioned case in abeyance pending final disposition of case number 89-5387. Lih Y. Young vs. Secretary of Health & Human Services. It appearing that this court issued it's mandate in that case in January 2, 1991, it is

ORDERED that the parties are directed

to file motions to govern future proceedings in this case within twenty one(21) days of the date of this order.

For the Court:

Constance L. Dupre, Clerk

By: Barbara J. Jones
Deputy Clerk

UNITED STATES COURT OF APPEALS

DISTRICT OF COLUMBIA CIRCUIT

WASHINGTON, D.C. 20001-2666

CONSTANCE L. DUPRE
CLERK

GENERAL INFORMATION
(202) 535-3300

January 2, 1991

James F. Davey, Clerk
United States District Court
for the District of Columbia
United States Courthouse
Washington, D.C. 20001

Re: 89-5387 Lih Y. Young v. Sec'y of Health and Human Services

Dear Mr. Davey:

Pursuant to the provisions of Rule 41(a) of the Federal Rules of Appellate Procedure,transmitted herewith, in lieu of

the formal mandate, is a certified copy of the judgment, filed on October 1, 1990.

An additional certified copy of the Order/Judgment is enclosed for delivery to Judge Revercomb.

For the Court:

Constance L. Dupre, Clerk

By: Elizabeth Brown

Deputy Clerk

Enclosure

cc: All counsel (letter only)

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Washington, D.C. 20507

Lih Y. Young
Appellant,

Request No. 05880220
(Appeal No. 01871586
v. (Agency Nos.SSA-102-86 and SSA-366-86)

Otis R. Bowen, Secretary
Department of Health & Human Services
Agency

Appeal No. 01881579
(Agency Nos.SSA-102-86,
SSA-366-86
FSA-446-87
SSA-442-85)

DENIAL OF APPEAL/DENIAL OF REQUEST TO REOPEN

On March 7, 1988, Lih Y. Young (hereinafter referred to as appellant) filed an appeal with the Equal Employment Opportunity Commission (EEOC) from a final decision of the Department of Health and

Human Services (hereinafter referred to as agency) concerning her complaint of unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq. (the Act). The appeal is accepted in accordance with EEOC Order No. 960, as amended. On December 31, 1987, appellant filed a request with this Commission to reopen and reconsider the decision in Lih Y. Young v. Otis R. Bowen, Secretary, Department of Health & Human Service, EEOC Appeal No. 01871586 (November 30, 1987). EEOC Regulations provide that the Commissioners may, in their discretion, reopen and reconsider any previous decision when the party requesting reopening submits written argument or evidence which tends to establish one or more of the three criteria prescribed by 29 C.F.R. 1613.235(b). Appellant appears

to base her request on 29 C.F.R. 1613.235(b)(1) (new and material evidence is available) and 29 C.F.R. 1613.235(b)(2) (where the previous decision involves an erroneous interpretation of law or regulation, or a misapplication of established policy). For the reasons set forth herin, appellant's appeal and Request to Reopen are denied.

ISSUE PRESENTED

The issue presented herein is whether the Commission should dismiss appellant's appeal and Request to Reopen in light of a civil action in the district court filed by appellant.

BACKGROUND

This case involves a Request to Reopen (Agency Nos. SSA-102-86 and SSA-366-86), and an appeal (Agency Nos. SSA-102-86.

SSA-366-86,[1] FSA-446-87 and SSA-442-85) filed by appellant concerning her allegations of unlawfulemployment discrimination. In light of the commonality of procedural and substantive issues involving appellant's complaints under consideration herein, the Commission hereby joins appellant's appeal and Request to Reopen for decision. See 29 C.F.R. S1613.251(b).

The relevant facts are as follows. In 1978, appellant, an economist, began employment at the agency's National Center for Health Services Research (NCHSR). On March 19, 1984, appellant resigned and charged the agency with constructive discharge. In April 1984 the agency

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[1] The Commission notes that the agency has used the prefixes "SSA" and "FSA" interchangeably when referring to the agency complaint numbers.

reemployed appellant at its Office of Family Assistance (OFA). Appellant worked there until June 13, 1986, when she was terminated. According to appellant, the agency discriminated against her throughout the period of her employment. On July 1, 1985, appellant filed a formal complaint (Complaint #1, Agency No. SSA-442-85) alleging reprisal and discrimination of the bases of her race (Asian) and national origin (Chinese) regarding the working conditions. Attached to appellant's complaint was a list of alleged discriminatory incidents occurring between October 2, 1984, and May 21, 1985. On January 24, 1986, appellant filed a second complaint (Complaint #2, Agency No. SSA-102-86) alleging the same bases of unlawful employment discrimination in the working conditions as listed in Complaint #1 attached to this

complaint was the same list of discriminatory incidents contained in Complaint #1; furthermore, added to this list were additinal employment incidents occurring through January 10, 1986. Thereafter, on July 1, 1986, appellant filed yet a third EEO complaint (Complaint #3, Agency No. SSA-366-86) alleging the same bases of discrimination as contained in Complaint Nos. 1 and 2; the attached list of discriminatory incidents included all of the incidents described in the first two complaints, with the addition of incidents occurring through June 12, 1986. In its final decision dated March 9, 1987 (FAD #1), the agency accepted, in part, and rejected, in part, the allegations contained in Complaint Nos. 2 and 3. The agency based its rejection on March 18, 1987, appellant's untimely contact with the EEO Counselor. Thereafter, on March

18, 1987 appellant appealed the agency's decision in Complaint Nos. 2 and 3. By decision dated November 30, 1987, the Commission in EEOC Appeal No. 01871586 affirmed, in part, the agency's rejection of portions of appellant's two complaints. Specifically the Commission noted that appellant's allegation concerning a denial of annual leave commencing June 14, 1986, occurred within thirty (30) days of the filing of Complaint #3. We, therefore, found that the agency should have referred appellant back to the EEO Counselor regarding this new matter raised on which there had been no counseling. Federal Personnel Manual (FPM) Letter No. 713-21 (4) (September 21, 1973). Accordingly, we vacated the agency's decision as to this allegation and affirmed the FAD #1 in all other respects.

The record indicates that in ancillary

proceedings pertaining to Complaint #1, the parties agreed to narrow the allegation which the agency would process down to seven (7). Additionally, during the pendency of appellant's appeal to the Commission on Complaint Nos. 2 and 3, appellant filed with the agency yet a fourth EEO complaint (Complaint #4, Agency No. FSA-446-87), this time alleging discrimination on the bases of race, national origing and reprisal concerning the agency's unfair and untimely processing of her previous complaints. Appellant also alleged that the agency manipulated the investigation of her previous complaints (citing to Complaint Nos. 1, 2, and 3), discriminatorily processed her Freedom of Information Act (FOIA) requests in relation thereto, and assessed her monetary fees for the

information requests. [2] Appellant, however, emphasized that the issues complained of in Complaint #4 were "different from those filed against NCHSR and OFA." Attached to this complaint was a list of alleged discriminatory incidents occurring between 1982 and June 12, 1986; the incidents listed as occurring between 1982 and June 1986 were the same incidents referred to in Complaint Nos. 1, 2 and 3. The record also indicates that on December 15, 1987, appellant filed a civil action in the United States District Court for the District of Columbia, Lih Y. Young v. Department of Health and Human Services, Civil Action No. 88-0004. Appellant alleged numerous and varied acts of continuing unlawful employment discrimination and retaliation. Appellant

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2 Appellant filed this complaint on April 20, 1987. She submitted an addendum to this complaint in May 1987.

stated that the acts complained of in this suit concerned her termination, the agency's failure to employ her, the agency's failure to promote, and other various acts as listed; moreover, attached to her civil action complaint was a list of alleged discriminatory incidents dating from October 2, 1984, through June 12, 1986; this list is identical to the lists attached to Complaint Nos. 1, 2, and 3. By Final Agency Decision dated February 11, 1988 (FAD #2) the agency cancelled all four (4) administrative complaints on the grounds that subsequent to the filings of the complaints, appellant filed a civil action on the identical matters raised in her four complaints. See 29 C.F.R. 1613.215.

Appellant now appeals FAD #2 which cancelled her four (4) administrative complaints. Appellant contends that she

filed her civil action suit in order to challenge the Commission's November 1987 decision rendered on appeal. Appellant therefore asserts that her civil action suit is limited to a procedural challenge of the rejected allegations in Complaint #3. Appellant is also requesting reopening of the Commission's decision dated November 30, 1987, which, as noted supra, remanded one allegation for EEO counselling and affirmed the agency's rejection of the remaining allegations contained in Complaint Nos. 2 and 3. In her Request to Reopen, appellant contends that the rejected allegations in Complaint Nos. 2 and 3 were timely because they were a part of continous on going discrimination by the agency. Further more, appellant contends that the agency discriminatorily and unfairly manipulated the processing of her complaints.

Appellant attaches to her reopening request a copy of a decision rendered by the U.S. Court of Appeals for the Fourth Cirduit in a previously filed civil action. Lih Y. Young v. National Center for Health Services Research, No. 686-1081 (Sept. 9, 1987).[3]

ANALYSIS AND FINDINGS

We first address the issue raised in appellant's appeal to the Commission.

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[3] In this decision, the court found that the acts complained of by appellant which occurred between 1982 and March 1984 consitiuted a continuing violation and that appellant's ultimate resignation from the agency on March 19, 1984, amounted to a constructive discharge. The court also found that the last act of discrimination by the agency, i.e., the constructive discharge, was a distinct cause of action, which appellant timely brought to the EEO Counselor's attention on April 17, 1984. The court therefore ruled that the district court erred by finding that the alleged forced resignation could not be a "discriminatory act," and that appellant's EEO contact as to the other matters complained of was therefore untimely. The court thus remanded the case to the district court for a determination on its merits.

Section 717(c) of the Act clearly provides that a federal employee may seek review of a claim of employment discrimiation by filing a civil action in a federal district court. However, pursuant to 29 C.F.R. 1613.283 (November 30, 1987), the filing of a civil action by a federal employee involving a complaint filed under the EEOC Regulations at 29 C.F.R. S 1613.201 et seq. terminates any further processing of the administrative complaint. Accordingly, under the facts presented therein , the dispositive inquiry is whether appellant's December 1987 civil action complaint involves a substantially similar subject matter to that involved in the four administrative complaints cancelled by the agency, so as to preclude the contimued exercise of jurisdiction over the complaints by either the Commission or the agency.

In the instant case, it is clear that the civil action suit involves the same subject matter as that involved in Complaint Nos. 1,2, and 3. Contrary to appellant's assertion that the civil action suit is restricted to a procedural challenge of the allegations rejected in Complaint #3, the Commission finds that appellant challenged not only the rejection by the agency and Commission of certain allegations contained in Complaint Nos. 1, 2 and 3, but appellant also raised substantive issues concerning whether the listed alleged discriminatory incidents constituted unlawful employment discrimination. In fact, appellant stated in her December 1987 civil action filing that the acts complained of therein concerned her termination, the agency failure to promote her, the agency's failure to employ her, and other

discriminatory incidents as listed. [4] Accordingly, we find that inasmuch as the civil action complaint involved Complaint Nos. 1,2, and 3, the Commission and agency are precluded from exercising jurisdiction over these complaints. We therefore find that the agency acted properly by cancelling Complaint Nos. 1, 2, and 3 for lack of jurisdiction. See section 1613.283.

Likewise, we find that the agency properly cancelled Complaint #4. Under the facts herein, neither the Commission nor the agency possess the jurisdiction to decide the issues contained in this complaint. Pursuant to Equal Employment Opportunity Management Directive 107 (EM-107) "spin off complaints," or complaints concerning

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[4] The "other discriminatory incidents" refer to those alleged discriminatory employment parctices listed on the pages attached to the appellant's civil action filing.

the undue delay or improper processing of pending complaints of discrimination, must be addressed in connection with the processing of the complaints from which they derive. In the instant case, if appellant still wishes to have considered the ancillary allegations relating to the agency's processing of her complaints , it is incumbent upon appellant to timely bring these matters to the attention of the district court by amending her civil action complaint to incorporate the "spin-off" allegations. Accordingly, for the reasons provided herein, the Commission affirms the 1988 FAD cancelling appellant's four adminstrative complaints. We therefore administratively close Complaint Nos. 1, 2, 3, and 4. Furthermore, in light of the foregoing determination that the Commission has no jurisdiction to decide the issues raised

in appellant's administrative complaints, we hereby deny appellant's Request to Reopen EEOC Apeal No 01871586. The Commission recognizes that under our November 1987 decision on Complaints Nos. 2,and 3, we directed the agency to refer appellant back to the EEO Counselor on the allegation pertaining to the denial of annual leave in June 1986; however, in light of our determinations herein, we advise the parties that the agency is no longer obligated to comply with our directive.[5]

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[5] The Commission also rejects appellant's assertion that the September 1987 decision by the Court of Appeals for the Fourth Circuit mandates our acceptance of those allegations of discrimination contained in Complaint #3 which were rejected as untimely. The decision by the Court of Appeals dies not concern the same alleged unlawful employment practives challenged in Complaint Nos. 2 and 3. In fact, the agency's actions which are the subject amtter of the September 1987 court decision concern an array of alleged unlawful employment incidents predating the alleged unlawful employment practices listed in either Complaint #2 or Complaint#3.

CONCLUSION

Based on a review of the evidence of record in EEOC Appeal No. 01881579, and for the foregoing reasons, it is the decision of the Commission to affirm the agency's final decison cancelling appellant's complaints on the ground that appellant filed a civil action suit involving her administrative complaints. Furthermore, after a careful review of appellant's Request to Reopen EEOC Appeal No. 01871586 (November 30, 1987), the Commission finds that appellant's request fails to meet the criteria of 29 C.F.R. 1613.235(b), and it is the decision of the Commission to deny appellant's request. There is no further right of administrative appeal from a decision of the Commission on Request to Reopen. However, appellant has been afforded the right to challenge the Commission's

decision in EEOC Appeal No. 01881579.

STATEMENT OF RIGHTS - ON APPEAL

RIGHT TO REQUEST REOPENING

This decision as it pertains to EEOC Appeal No. 01881579 is final unless a timely request to reopen is filed. The Commissioners may, in their discretion, reopen and reconsider the decision in this case if you or the agency submits a written request and argument tend to establish that:

1. New and material evidence is available that was not readily available when the previous decision was issued; or

2. The previous decision involves an erroneous interpretation of law or regulation or misapplication of established policy; or

3. The previous decision is of a

precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand or is otherwise of such exceptional nature as to merit the personal attention of Commissioners.

Requests and supporting arguments MUST be submitted to the Commission and the opposing party within the 30-day time frame for filing a request to reopen. A cross request to reopen, or any argument in opposition to the request to reopen, MUST be submitted to the Commission and the opposing party within 20 days of receipt of the request to reopen. See 29 C.F.R. 1613.235 (copy attached). All requests and arguments must bear proof of postmark and be submitted to the Director, Office of Review and Appeals, Equal Employment Opportunity Commission, 5203 Leesburg Pike, Suite 900, Falls Church,

department means the national organization, and not the local office, facility or department in which you might work. DO NOT NAME JUST THE AGENCY OR DEPARTMENT. You must also state the official title of the agency head or department head. Failure to provide the NAME OR OFFICIAL TITLE of the agency head or department head may result in the dismissal of your case.

RIGHT TO COUNSEL

If you decide to file a civil action and do not have or cannot afford the services of an attorney, under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec 2000e et seq., as amended, and the Rehabilitation Act of 1973, 29 U.S.C. Sec. 791 and Sec. 794c, as amended, you may request that the Court appoint an attorney to represent you and that the Court permit

file a civil action. See Lehman v. Nakshian, 453 U.S. 156 (1981); 29 U.S.C. 633a(f); and 28 U.S.C. 2401(a). If you file a civil action, YOU MUST NAME THE PERSON WHO IS THE OFFICIAL AGENCY HEAD OR DEPARTMENT HEAD AS THE DEFENDANT IN THE COMPLAINT. Agency or department means the national orgainzation, and not the local office, facility or department in which you might work. DO NOT JUST NAME THE AGENCY OR DEPARTMENT. You must also state the title of the official agency head or department head. Failure to provide the name and official title of the agency head or department head may result in the dismissal of your case. Fed. R.Civ. P. 25(d)(2).

APPOINTMENT OF COUNSEL

If you decide to file a civil action and do not have or cannot afford the services

Department of health and Human sevices

REGISTERED RETURN RECEIPT REQUESTED

Dr. Lih Y. Young

1121 Pipestem Place

Rockville Pike, Maryland
20854

Re: FSA-102-86

FSA-366-86

SSA-442-85

FSA-466-87

Dear Dr. Young:

This is to inform you of the Department's decision to cancel the above-captioned complaints of discrimination which you filed against the Family Services Administration (FSA) and the Social Security Administration (SSA).

The Department has been informed by Summons dated January 5, 1988, of your civil suit filed December 15, 1987 in U.S. District Court for the District of Columbia. In examining a copy of your suit provided by the court, we have verified

pending civil action in a United States District Court in which you are a party.

NOTICE OF APPEAL RIGHTS

If you are dissatisfied with this decision, you may submit a written notice of appeal, in duplicate, to the Director, Office of Review and Appeals, EEOC, 5203 Leesburg Pike, Suite 900, Falls Church, Virginia 22041, and in accordance with 29 CFR Section 1613.233, which states, in pertinent part, the following:

(a) Except as provided in paragraph (b) of this section, a complainant may file a notice of appeal at anytime up to 20 calendar days after receipt of the agency's notice of final decision on his or her complaint. Any statement of brief in support of the appeal must be submitted to the

judicial relief by filing a civil action in an appropriate U.S. District Court within thirty (30) calendar days after receipt of this notice of final decision. Please note: If you file a notice of appeal with the Commission, the right to file a civil action will be preserved. In that case, you may file a civil action within thirty (30) calendar days after receipt of the Commission's decision; or, if the Commission has not issued its decision, 180 calendar days after the date the Office of Review and Appeals accepted the appeal.

If you elect to file a civil action, be advised that you may appeal to a U.S. District Court for appointment of an attorney to represent you in any court proceeding relating to this decision. The court may appoint an attorney to represent you and may permit commencement of a court

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Review and Appeals
5203 Leesburg Pike
Falls Church, Virginia 22041

Lih Y. Young, Appellant, Appeal No. 01871586
Appeal Nos. SSA-102-86
SSA-366-86

v.

Department of Health and Human Services, Agency.

DECISION

Appellant filed an appeal with this Commission from a final decision of the agency concerning her complaint of unlawful employment discrimination, in violation of Title VII the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e et seq. The agency decision is dated March 9, 1987. The appeal was postmarked March 18, 1987. Accordingly, the appeal is timely (see 29 C.F.R. Section 1613.233(a)), and is accepted in accordance with EEOC Order No. 960, as

attention of the Equal Employment Opportunity Counselor within thirty (30) days of the date of the matter causing appellant to believe he was discriminated against, or if a personnel action, within 30 calendar days of its effective date. Nothing in the record reveals timely contact with an EEO Counselor regarding any of the rejected or disregarded allegations. Also, all of the rejected allegations, except one, occurred more than thirty (30) days prior to the filing of their respective complaints. Further, appellant does not allege that the rejected allegations constitute part of a continuing violation that warrants accepting them along with other allegations. Appellant has failed to submit adequate justification, pursuant to 29 C.F.R. Section 1613.214(a)(4), for extending the time limitation beyond

decision and applicable regulations.

IMPLEMENTATION OF THE COMMISSION DECISION

Under EEOC regulations, compliance with the Commission's corrective action is mandatory. The agency must report to the Commission, within thirty (30) calendar days of receipt of the decision, that corrective action has been taken. The agency's report should be forwarded to the Compliance Officer, Office of Review and Appeals, Equal Employment Opportunity Commission, 5203 Leesburg Pike, Falls Church, Virginia 22041. A copy of the report should be sent to the appellant. A statement of appellant's right (R-1) is attached to this decision.

FOR THE COMMISSION:

30 Nov. 1987
Date

Dolores L. Rozzi, Director
Office of Review and Appeals

may describe the defendant by official title rather than by name. Failure to provide the NAME OR OFFICIAL TITLE of the agency head or, where appropriate, the department head, may result in the loss of any judicial redress to which you may be entitled. (Please note: For this purpose, Department means the overall national organization, such as the now defunct Department of Health, Education and Welfare, not the local administrative department where you might work.) You must be sure that the proper defendant is named when you file your civil action.

APPOINTMENT OF COUNSEL

If you decide to file a civil action and do not have or are unable to obtain the services of an attorney to act on your behalf, under Title VII of the Civil Rights Act of 1964 , 42 U.S.C. 2000e et seq., as amended, and the Rehabilitation

an erroneous interpretation of law or regulation or misapplication of established policy; or

3. The previous decision is of a precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners.

EITHER PARTIES' REQUESTS AND ANY SUPPORTING ARGUMENTS, must be submitted within the 30 day time frame for filing a request to reopen. ALL REQUESTS must bear proof of postmark and be submitted to the Director, Office of the Review and Appeals, Equal Employment Opportunity Commission, 5203 Leesburg Pike, Suite 900

DEPARTMENT OF HEALTH & HUMAN SERVICES
Office of the Secretary
Washinngton, D.C

Ms. Lih Y. Young
1121 Pipestem Place
Rockville, Maryland 20854

March 9, 1987

File Nos. FSA-102-86
FSA-366-86

Dear Ms. Young:

We have accepted your formal complaints of discrimination based on national origin (Chinese), race (Asian) and complaints of reprisal for previous involvement in the EEO process, filed on January 24, 1986 (FSA 102-86) and July 1, 1986 (FSA 366-86) against the Social Security Administration (SSA).

The captioned complaints have been joined for processing under the provisions of Title 29, Code of Federal Regulations, Section 1613.251(b).

We have accepted the following

Counselor, she received a suspension notice on January 10, 1986.

4. Complainant alleges that, in reprisal for having previously contacted an EEO Counselor, she was denied support services on January 2, 1986.

SSA-336-86

1. Complainant alleges that, because of her race and national origin and in reprisal for having filed an EEO complaint on April 3, 1986, she received an unfair progress review.

2. Complainant alleges that, because of her race and national origin and in reprisal for having filed an EEO complaint, on May 6, 1986 she was given a written notice of proposed

you to present a paper at a professional meeting on March 3, 1986.

3. That your employment opportunities and GS levels of employees in the Department of Health and Human Services are discriminatory, as evidenced by unjustifiable removal, disciplinary actions, performance evaluations and other unfair treatment in its agencies (e.g., OFA and NCHSR).

4. That your supervisor disallowed your use of annual leave scheduled for June 14, 1986.

The reason for our nonacceptance is that the EEO Counselor's Report, signed on June 12, 1986 does not reflect that you received counseling on any of these allegations/issues. Accordingly, you are

By copy hereof, the designated EEO Officer is advised of the acceptance of this complaint and is requested to ask appropriate officials to provide necessary onsite assistance to the investigator.

Sincerely yours,

Orlando Hobbs

Director
Investigations Division

Enclosure

cc: Paul Bennett, Director, Office of Civil Rights and Equal Opportunity, SSA
Rose M. Lepore, SSA Regional Commissioner, Region 3 (Philadelphia)
Naomi Marr, Associate Administrator for Management and Information, 5613N
Pat Ellis, Acting Director, CLASS
Complaint File
Investigator

March 2, 1988

VIA CERTIFIED

John Bowers, Director
Analysis & Adjudication Division
DHHS
Office of the Secretary
200 Independence Ave., S.W.
Washington, D.C. 20201

EEO Complaint of: Lih Young
EEOC Case No.: 033-087-X-2060
Agency Case No.: SSA-442-85

Dear Mr. Bowers:

We are returning the above-captioned Equal Opportunity complaint file for the following reason(s):

_____ 1) Settlement by Complainant - Letter of Withdrawal made part of complaint file.

_____ 2) Settlement

_____ 3) Failure to proceed

_____ 4) Insufficient investigation

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Baltimore District Office

September 30, 1987

In Re:

LIH Y. YOUNG

COMPLAINT

EEOC No.:
033-087-X-2060

v.

Agency No.:
SSA-442-85

UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES

AGENCY

PREHEARING CONFERENCE REPORT

A prehearing conference was held in this matter on September 21, 1987. Present, in addition to the undersigned, were: The Complainant, Lih Y. Young and counsel for the Agency, Mary Mitchell Armstrong.

The parties stipulated that the issues in this case are:

1. **Was the Complainant unlawfully discriminated against on the basis of her national origin (Chinese) and race (Asian-American) when on April 24, 1985, her request to attend a conference on Research and Statistics was denied?**
2. **Was the Complainant unlawfully discriminated against on the basis of her national origin (Chinese) and race (Asian-American) when on April 25, 1985, she was given a progress review written in pencil and was asked to sign it?**
3. **Was the Complainant unlawfully discriminated against on the basis of her national origin**

(Chinese) and race (Asian-American) when on April 30, 1985, she was given an inaccurate progress review?

4. Was the Complainant unlawfully discriminated against on the basis of her national origin (Chinese) and race (Asian-American) when on April 30, 1985, her requests for computer training, support services, and task assignments were denied?

5. Was the Complainant unlawfully discriminated against on the basis of her national origin (Chinese) and race (Asian-American) when on May 3 and May 6, 1985, her supervisor made false statements concerning her work?

6. Was the Complainant unlawfully

discriminated against on the basis of her national origin (Chinese) and race (Asian-American) when her performance appraisal for the period of October 1, 1983 through October 26, 1984, was changed after she signed it?

7. Was the Complainant unlawfully discriminated against on the basis of her national origin (Chinese) and race (Asian-American) when on May 24, 1985, the Division Director refused to address issues which she complained about concerning her progress review of April 30, 1985?

After considering the complaint file and the request of the Complainant I have determined that the Complainant may call

in addition to herself the following witnesses:

1. The Director of the Computer Center, National Institute of Health, or other appropriate individual with expertise using SPSS/SPSSX and SPSSPC statistical packages.
2. The Director, Personnel Office, Social Security Administration, or other appropriate personnel management specialist.

The Agency may call as it witnesses the following:

1. Paul Borders
2. Howard Rolston
3. Gay Morris
4. Wilbur Weder
5. Marissa Huttinger

The attendancae of federal employees at this hearing is official duty for all

purposes. Witnesses are assured freedom from restraint, interference, coercion or reprisal. It is the Agency's obligation to make arrangements for the appearance of the witnesses who are federal employees at the scheduled time of the hearing.

The Complainant has made nine requests for the production of evidence. After considering the complaint file and these requests; I have determined the following:

1. In regard to request #1, the Agency shall, concerning the employees of the Office of Family Assistance as of May, 1985 and at the GS-12 level and above, produce information setting forth their race, national origin, position title, grade, series, division, and highest educational level. The

other information sought in request #1 is denied.

2. In regard to request #2, it is noted that Exhibit 9 of the Investigation File contains appraisals of employees made by Paul Bordes for the period of October 1, 1983 to September 30, 1985. The Agency shall determine if there were any other employees appraised by Mr. Bordes during this time period. If there were, the Agency shall produce appropriately sanitized copies of their appraisals. The Agency shall also provide information concerning any awards or promotions given to employees supervised by Mr. Bordes during this time period. The other information sought in

request #2 is denied.

3. In regard to request #3, the Agency shall determine if Paul Bordes prepared draft copies of evaluations and appraisals. If so, and if they are available the Agency shall produce appropriately sanitized copies. The other information sought in request #3 is denied.

4. Complainant's request 4 and 5 are denied.

5. In regard to request #6, the Agency shall provide information setting forth the race, national origin, position, title, grade, and series of the employees, if any, Paul Bordes gave permission to participate in the Conference on Research and Statistics given July 22-24, 1985, in Lincoln,

Nebraska. The other information sought in request #6 is denied.

6. The information sought in request #7 is provided in Exhibit 26 of the Investigative file.

7. Information sought in requests 8 and 9 was given Complainant at the prehearing conference.

I am receptive to reconsidering my denial of requests information if the Complainant can show that such information is relevant, material and not unduly repetitious concerning matters in issue.

The Agency is directed to produce information pursuant to 29 C.F.R. 1613.218(b)(2). The Agency is requested to produce this information as soon as practicable so as to avoid the need for continuances and delays at the hearing.

The hearing in this matter shall be

held on Thursday, November 19, 1987 at 10:00 A.M. at a place to be announced.

Marlin D. Schreffler
Administrative Judge
(301) 962-7711 or FTS 922-7711

A copy of PREHEARING CONFERENCE REPORT was sent on September 30, 1987 by regular U.S. mail to the following:

Lih Young
1121 Pipestem Place
Rockville, MD 20854

Mary Mitchell Armstrong
Attorney
Business & Administrative Law Division
Office of the General Counsel
Room 5363
Department of Health & Human Services
330 Independence Avenue, S.W.
Washington, D.C. 20201

(No Letter Head From Department of Health & Human Service)

December 16,1985

Dr. Lih Y. Young
1121 Pipestem Place

Rockville, Maryland
20854

File No. SSA-442-85
Symbol: KJA

Dear Dr. Young:

This letter is to amend your complaint of discrimination based on national origin (Chinese), race (Asian-American), and a complaint of reprisal for having previously filed EEO complaints, to delete the basis of reprisal and to include the following allegations:

We have accepted the following issue(s)/allegation(s):

1. Complainant alleges that because of her national origin and race, her request to attend a conference on Research and Statistics was denied on April

24, 1985.

2. Complainant alleges that because of her national origin and race, her requests for computer training, support services, and task assignments were denied on April 30, 1985.

3. Complainant alleges that because of her national origin and race, the Divsion Director refused to address the issues which she complained about in her progress review on May 24, 1985.

The enclosed notice provides important information concerning the investigation of this complaint. Please read this notice carefully. Note further: If your complaint is appealable to the Merit Systems Protection Board, you must file your appeal within one year of the date you filed your complaint with this

Department.
By copy hereof, the designated EEO Officer is advised of the acceptance of this complaint and is requested to ask appropriate officials to provide necessary onsite assistance to the investigator.

Sincerely yours,

Orlando Hobbs

Director

Investigations Division

Enclosure

cc: John S. Bowers, Director, AAD
Willard Wright, Director, OCREO, SSA
Complaint File
Investigator

Illegible

(No letterhead from USDepartment of Health & Human Services)

10/26/85

Dr. Lih Y. Young
1121 Pipestem Place
Rockville, Maryland 20854

File No. SSA-442-85
Symbol: KJA

Dear Dr. Young:

We have accepted your formal complaint of discrimination based on national origin (Chinese), race (Asian-American), and a complaint of reprisal for having previously filed EEO complaints, filed on July 22, 1985 against the Social Security Administration: (SSA).

We have accepted the following issue(s)/allegation(s):

1. Complainant alleges that, because of her national origin race, and in reprisal for having previously filed EEO complaints, she was given a progress review

written in pencil and was asked to sign it on April 25, 1985.

2. Complainant alleges that, because of her national origin, race, and in reprisal for having previously filing EEO complaints she was given an inaccurate progress review on April 25, 1985.

3. Complainant alleges that because of her national origin, race, and in reprisal for having previously filed EEO complaints her performance appraisal for the period of October 1, 1983 through October 26, 1984 was changed after she signed it. Complainant stated that she became aware of this allegation on May 21, 1985.

4. Complainant alleges that because

of her national origin, race, and in reprisal for having previously filed EEO complaints her supervisor made false statements concerning her work on May 3 and 6, 1985.

The enclosed notice provides important information concerning the investigation of this complaint. Please read this notice carefully.

By copy hereof, the discriminated EEO Officer is _____ of the acceptance of the complaint and is requested to ask appropriate officials to provide necessary _____ assistance to the investigator.

Sincerely yours,

Orlando Hobbs

Director

Investigations Division

Enclosure

cc: John S. Bowers, Director, AAD

Willard Wright, Director, OCREO, SSA
Complaint File
Investigator

Illegible

Lih Young, 3/15/91

ADMINISTRATIVE DISCRIMINATION COMPLAINTS *
AND COURT CASES:
Filed by Complainant Lih Y. Young, Ph.D.

* 1. Complaint ASH-262-84, formally filed on 3/20/84;
DHHS and EEOC rejected and disregarded all complained issues except one, which is very narrowly defined and still pending hearing by the DHHS and EEOC. The rest was improperly processed through administrative procedures.

* 2. Complaint ASH-401-84;
Out right rejection by DHHS and EEOC with unjust reason of untimeliness of filing the complaint, even the prior complaint ASH-262-84 was still pending in administrative

procedures.

3. U.S. District Court for the District of Maryland; Case No. CA-85-2547 (Judge Joseph Young); filed on 6/14/85 because of improper rejection of complaint No. ASH-401-84;

4. U.S. 4th Circuit Court, No. 86-1081; Remanded and reversed the judgement of the District Court on CA-85-2547.

* 5. Complaint SSA-442-85;

* 6. Complaint FSA (SSA)-102-86;

* 7. Complaint FSA (SSA)-366-86;

* 8. Complaint FSA (SSA)-466-87;

9. U.S. District Court for the District of Columbia, No. 88-0004; (Judge George H. Revercomb);
Originally filed because of improper rejection of complained issues by DHHS and EEOC on complaints SSA-102-86 and SSA-366-86;

After this court case being assigned to Judge Revercomb, DHHS cancelled all other complaints, including those complained issues previously accepted. The case was amended to include the rejection or cancellations of all those complaints.

10. Complaint OSH-82-89; Discrimination complaint alleging continuing discrimination, patterns of practices, policies and systems; with increasing emphasis on the improper processing of complaints with misconducts by DHHS and EEOC.
11. U.S. District Court for the District of Maryland; B-88-768; (Judge Walter E. Black, Jr.);
12. U.S. 4th Circuit Court, 88-1017; Appealed from the District Court 85-2547 dismissed second time by Judge

Young with peculiar reason of naming the wrong party, instead of remanding the complaint DHHS for full investigation.

13. U.S. District Court for the District of Columbia, No. 89-2227; (Judge George H. Revercomb);
    Filed because of improper rejection of complaint OSH-82-89.
14. U.S. Court of Appeals for the District of Columbia, No. 89-5387;
    Appealed from the U.S. District Court, 88-0004, because of improper court procedures and rulings.
15. U.S. Circuit Court for the District of Columbia, Petition for the Rehearing and Suggestion for Hearing and Rehearing en. banc., from the Judgement on 89-5387.
16. U.S. Circuit Court for the District of Columbia, 90-5195;

Appealed from interlocutory and final Judgements on the District Court 89-2227 by Judge revercomb without a hearing, conference or trial.

17. U.S. Supreme Court, 89-1010; Remanded and vacated judgement to U.S. 4th Circuit Court, No. 88-1017.

18. U.S. Supreme Court, A-675; Application to extend time to file petition for a writ of certiorari to the U.S. Court of Appeals for the District of Columbia, No. 89-5387, because of improper court procedures and time constriant.

DEPARTMENT OF HEALTH & HUMAN SERVICES

September 24,1986

Dr. Lih Y. Young
1121 Pipestem Place
Rockville, Maryland 20854

Re: ASH-262-84

Dear Dr. Young:

By letter dated September 17, 1986, Mr. John E. Tomas, EEOC Attorney Examiner, remanded the complaint file on the above-referenced discrimination complaint to this office. The Examiner requested that we hold the complaint until such time as a decision is reached with respect to the civil action that is pending. Accordingly, we will comply with the Examiner's request and will take no further action until the court decision is rendered.

Sincerely yours,

John S. Bowers

Director, Analysis and

Adjudications Division

cc: Virginia Mitz
John E. Tomas
Dan Rondeau

(No letterhead form Department of Health and Human Services)

October 16,1984

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Dr. Lih Y. Young
1121 Pipestem Place
Rockville, Maryland 20854

File No. ASH-262-84
Symbol KJA

Dear Dr. Young:

We have accepted your formal complaint of discrimination based on national origin (Chinese), filed on March 20, 1984 against the Office of the Assistant Secretary for Health (OASH).

We have accepted the following issue(s)/allegation(s):

Complainant alleges that, because of her national origin her supervisor behaved in a violent, and irrational manner during a discussion on January 19, 1984.

You have been advised by separate

correspondence concerning the remaining issue/allegation in your complaint of discrimination.

The enclosed notice provides important information concerning the investigation of this complaint. Please read this notice carefully.

By copy hereof, the designated EEO Officer is advised of the acceptance of this complaint and is requested to ask appropriate officials to provide necessary onsite assistance to the investigator.

Sincerely yours,

Howard P. Harrison

Director, Office of Personnel

Systems Integrity

Enclosure

cc:Samuel Hoston, Director, DCAM
Dan Rondeau, Deputy Director, EEO, PHS.
Investigator

Complaint File

STATUTORY PROVISIONS AND RULES

Title VII U.S.C. 2000e et. seq.

29 C.F.R. Part 1613

F.R.C.P. 52(a)

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMMENDED

42 U.S.C. 2000e et seq.*

DISCRIMINATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN

Sec. 703. (a) It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. (As

amended by P.L. 92-261, eff. March 24,1972)

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex or national origin.

(c) It shall be an unlawful employment practice for a labor organization-

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify

its membership or applicants for membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section. (As amended by P.L. 92-261, eff. March 24, 1972)

(d) It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling

apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such

program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be unlawful employment practice for a school, college, university,or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of

learning is directed toward the propagantion of a particular religion.

(f) As used in this title, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position,

for an employer to discharge an individual from any position, or for an employment agency to fail to refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if-

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Notwithstanding any other provision of this title, it shall not be

an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit or system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion,sex, or national origin; nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended, or used to discriminate because of race, color, religion, sex, or national origin. It shall not be an unlawful employment

practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid to employees of such employer if such differentiation is authorized by the provisions of Section 6(d) of the Fair Labor Standards Act of 1938 as amended (29 USC 206(d)).

(i) Nothing contained in this title shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management

committee subject to this title to grant preferential treatment to any individual or toany group because of the race, color, religion,sex or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organizatrion, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section , or other area, or in the available work force in any community, State, section, or other area.

OTHER UNLAWFUL EMPLOYMENT PRACTICES

Sec. 704. (a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title. (As amended by P.L. 92-261, eff. March 24, 1972)

(b) It shall be an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee indicating any preferance, limitaion,specification, or discrimination, based on race, color,

religion, sex or national origin, except that such a notice or adverisement may indicate a preference, limitation, specification, or discrimination based on religion, sex or national origin when religion, sex or national origin is a bona fide occupational qualification for employment. (As amended by P.L. 92-261, eff. March 24, 1972)

NON DISCRIMINATION IN FEDERAL GOVERNMENT EMPLOYMENT

Sec. 717. (a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code in executing agencies as defined in section 105 of title 5, United States Code (including employees and applicants for

employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in th competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion,sex, or national origin. (Added by P.L. 92-261, eff. March 24, 1972)

(b) Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay , as will effectuate

the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall —

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semi-annual basis) progress reports from each such department, agency,

or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall iclude a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to -

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress. (Added by P.L. 92-261, eff. March 24, 1972)

(c) Within thirty days of receipt of notice of final action taken by a department, agency , or unit referred to

in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agnecy, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as

appropriate, shall be the defendant.

(d) The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder. (Added by P.L. 92-261, eff. March 24, 1972)

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government. (Added by P.L. 92-261, eff. March 24, 1972)

FEDERAL REGISTER

FRIDAY, OCTOBER 30, 1987

PART V

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR PART 1613

EQUAL EMPLOYMENT OPPORTUNITY IN THE FEDERAL GOVERNMENT; COMPLAINTS OF DISCRIMINATION; FINAL RULE

1613.211 General

An agency shall insure that its regulations governing the processing of complaints of discrimination on grounds of race, color, religion,sex, national origin, age or handicapping conditon comply with the principles and requirements in 1613.212 throughout 1613.222 except where excluded in 1613.514.

3. Section 1613.212(a) is revised to

read as follows;

1613.212 [Amended]

(a) The agency shall provide in its regulations for the acceptance of a complaint from any aggrieved employee or applicant for employment who believes that he or she has been discriminated against by that agency because of race, color, religion, sex, or national origin, age or handicapping condition. A complaint may also be filed by an organization for the aggrieved person with the person's consent.

4. Section 1613.213 is amended by revising the first sentence of paragraph (a), by redesignation paragraphs (b) and (c) as paragraphs (c) and (d), and by adding new paragraph (b) as follows:

1613.213 [Amended]

(a) The agency shall require that an aggrieved person who believes that he or

she was discriminated against because of race, color, religion,sex, national origin, age or handicapping conditon consult with an Equal Employment Opportunity Counselor to try to resolve the matter.

(b) Upon initial contact or as soon thereafter as possible, the Equal Employment Opportunity Counselor shall inform each aggrieved person of the possible applicability of 5 U.S.C. 7121 (d) to the alleged discriminatory action. The Equal Employment Opportunity Counselor shall communicate the substance of 1613.219 concerning the election of remedies to each aggrieved person.

5. Section 1613.214 is revised to read as follows:

1613.214 Filing and processing of complaint.

(a) *Time Limits.*(1) An agency shall

require that a complaint be submitted in writing by the complainant or representative and be signed by the complainant. The complaint may be delivered in person or submitted by mail. The agency may accept the complaint for processing in accordance with this subpart only if:

(i) The complainant brought to the attention of the Equal Employment Opportunity Counselor the matter causing him/her to believe he/she had been discriminated against within 30 calendar days of the date of the alleged discriminatory event, the effective date of an alleged discriminatory personnel action, or the date that the aggrieved person knew or reasonably should have known of the discriminatory event or personnel action; and

(ii) The complainant or

representative submitted the written complaint to an appropriate official within 15 calendar days after the date of the receipt of the notice of the right to file a complaint.

(2) The appropriate officials to receive complaints are the head of the agency, the agency's Director of Equal Employment Opportunity, the head of a field installation, and such other officials as the agency may designate for that purpose. Upon receipt of the complaint, the agency official shall transmit it to the Director of Equal Employment Opportunity or appropriate Equal Employment Opportunity Officer who shall acknowledge its receipt in accordance with paragraph (a)(3) of this section.

(3)A complaint shall be deemed filed on the date it is received, if delivered

to an approprite official , or on the date postmarked if addressed to an appropriate official, or on the date postmarked if addressed to an appropriate official designated to receive complains. The agency shall acknowledge, in writing, to the complainant or representative receipt of the complaint and advise the complainant in writing of all administrative rights and of the right to file a civil action as set forth in 1613.281, including the time limits imposed on the exercise of these rights.

(4) The agency shall extend the time limits in this section when the complainant shows that he/she was not notified of the time limits and was not otherwise aware of them, was prevented by circumstances beyond the complainant's control from submitting the matter within the time limits; or for other reasons

considered sufficient by the agency.

(b) Representation and official time. (1) At the stage in the processing of a complaint, including the counseling stage under 1613.213, the complainant shall have the right to be accompanied, represented, and advised by a representative of complainant's choice.

(2) If the complainant is an employee of the agency, he/she shall have a reasonable amount of official time to prepare the complaint if otherwise on duty. If the complainant is an employee of the agency and he designates another enployee of the agency as his/her representative, the representative shall have a reasonable amount of official time, if otherwise on duty,to prepare the complaint. The agency is not obligated to change work schedules, incur overtime wages, or pay travel expenses to

facilitate the choice of a specific representative or to allow the complainant and representative to confer. However, the complainant and representative, if employed by the agency and otherwise in a pay status, shall be on official time, regardless of their tour of duty, when their presence is authorized or required by the agency or the Commission during the investigation, informal adjustment, or hearing on the complaint.

(3) In cases where the representation of a complainant or agency would conflict with the official or collateral duties of the representative, the Commission (or agency prior to a hearing on the complaint) may, after giving the representative an opportunity to respond, disqualify the representative.

4. Section 1613.215 is revised to read as follows:

(a) The agency head or designee shall reject or cancel a complaint;

(1) That fails to state a claim under Sec. 1613.212 or that states the same claim that is pending before or has been decided previously by the agency;

(2) The alleges that an agency is proposing to take action that may be discriminatory;

(3) That is the basis of a pending civil action in a United States District Court in which the complainant is party;

(4) That is filed untimely, unless the agency extended the time limits in accordance with Sec 1613.214(a)(4);

(5) That the complainant elected to pursue under a negotiated grievance procedure as identified in 1613.219;

(6) That the complainant has failed to prosecute. The agency may cancel an allegation or a complaint for failure to

prosecute only after it has provided the complainant with a written request, that includes a notice of proposed cancellation, to provide certain information or otherwise proceed with the complaint, and the complainant has failed to satisfy the request within 15 calendar days of its receipt. However, instead of canceling for failure to prosecute, the complaint may be adjudicated if sufficient information for that purpose is available; or

(7) If the complainant refuses within 15 calender day of receipt of an offer of settlement to accept an agency offer of full relief in adjustment of the complaint, provided that the agency's Director of Equal Employment Opportunity, or a disignee reporting direcly to the Director, has certified in writing that the agency's written offer of relief

constitutes full relief. An offer of full relief under this subsection is appropriate relief in 1613.271. The offer need not contain the decision whether disciplinary action is necessary, but the basis for the decision shall be recorded separately form the complaint file.

(b) The agency head or designee shall transmit the decision to reject or cancel a complaint by letter to the complainant and the complainant's representastive. The decision letter shall inform the complainant of the right to appeal the decision to the Commission, the time limit for filing an appeal with the Commission, and the complainant's right to file a civil action as described in 1613.281.

5. Secgtion 1613.216 is revised to read as follows;

1613.216 Investigation.

(a) The Equal Employment Opportunity

OFficer shall advise the Director of Equal Employment Opporttunity of the acceptance of a complaint. THe Director of Equal Employment Opportunity shall provide for the prompt investigation of the complaint. The person assigned to investigate the complaint shall not occupy a position in the agency that is directly or indirectly under the jurisdiction of the head of that part of the agency in which the complaint arose. The agency shall authorize the investigator to administer oaths and require that statement of withnesses shall be under oath or affirmation, without a pledge of confidence. The investigation shall include a thorough review of the circumstances under which the alleged discrimination occurred, the treatment of members of the complainant's group identified by his complaint as compared

with the treatment of other employees in the organizational segment in which the alleged discrimination occurred, and any policies and practices related to the work situation which may constitute, or appear to constitute, discrimination even though they have not been expressly cited by the complainant. Information needed for an appraisal of the utilization of members of the complainant's group as compared to the utilization of persons outside the complainant's group shall be recorded in statistical form in the investigative file, but specific information as to a person's membership or nonmembership in the complainant's group needed to facilitate an adjustment of the complaint or to make an informed decision on the complaint shall, if available, be recorded by name in the investigative file. (As used in this subpart, the term

"investigative file" shall mean the various documents and information acquired during the investigation under this section - including affidavits of the complainant and withnesses, and copies of, or extracts from records, policy statements, or regualtions of the agency-organized to show their relevance to the complaint or the general environment out of which the complaint arose.) If necessary, the investigator may obtain information regarding the membersip or nonmembership of a person in the complainant's group by asking each person concerned to provide the information voluntarity; he shall not require or coerce an employee to provide this information.

(b) The Director of Equal Employment Opportunity shall arrange to furnish to the person conducting the investigation a

written authorization :

(1) To investigate all aspects of complaints of discrimination,

(2) To require all employees of the agency to cooperate with him in the conduct of the investigation, and

(3) To require employees of the agency having any knowledge of the matter complained of to furnish testimony under oath or affirmation without a pledge of confidence.

(c) The Commission may assume responisbility for the investigation of any portion or all of an agency's complaints upon the execution of a memorandum of understanding to this effect with the agency. The agency shall reimburse the Commission for all expenses incurred in connection with the investigation. The Commission shall forward to the agency upon completion of

the investigation the investigative file and the recommended disposition unless within 30 days after the agency receives the investigative file and recommended disposition the complaint has been informally adjusted in accordance with S 1613.217(c).

6. Section 1613.217 is revised to read as follows:

1613.217 Adjustment of complaint and offer of hearing.

(a) The agency shall provide an opportunity for adjustment of the complaint on an informal basis agter the complainant has reviewed the investigative file. For this purpose, the agency shall furnish the complainant, or the complainant's represetative if there is one, a copy of the investigative file promptly after receiveing if from the investigator, and provide opportunity for

the complainant to discuss the investigative file with appropriate officials. If an adjustment o fthe complaint is arrived at, the terms of the adjustment shall be reduced to writing and made part of the complaint file, with a copy of the terms of the adjustment provided the complainant. An informal adjustment of a complaint may include an award of back pay, attorney's fees or other appropriate relief. Where the parties agree on an adjustment of the complaint, but cannot agree on whether attorneys fees or costs should be awarded or on the amount of attorney's fees or costs, the issue of the award of attorney's fees or costs or the amount which should be awarded may be severed and shall be the subject of a final decision under 1613.221(d). The decision of whether to award attorney's fees or costs

or of the amount to be awarded may be the subject of an appeal to the Commission under the provisions of 1613.231 thorugh 1613.240.

(b)Any settlement agreement knowingly and voluntarily agreed to by the parties, reached at any stage of the complaint process shall be binding on both parties. If the complainant believes that the agency has failed to comply with the terms of a settlement agreement, the complainant shall notify the Director of Equal Employment Opportunity, in writing, of the alleged noncompliance with the settlement agreement, within 30 days of when the complainant knew or should have known of the alleged noncompliance. The complainant may request that the terms of the settlement agreement be specifically implemented or, alternatively, that the complaint be reinstated for further

processing from the point processing ceased under the terms of the settlement agreement. Upon receipt of the complainant's written allegation of noncompliance with the settlement agreement, the agency shall have thirty (30) calender days in which to resolve the matter and to respond to the complainant, in writing concerning the matter. If, after thirty (30) calendar days from the date of the agency's receipt of the complainant's written allegations of noncompliance with the settlement agreement, the agency has not responded to the complainant, in writing, or if the complainant is not satisfied with the agency's attempt to resolve the matter, the complainant may appeal to the Commission for a determination as to whether the agency has complied with the terms of the settlement agreement. The

complainant may file such an appeal 35 days after service of the allegation sof noncompliance, but must file an appeal within 20 days of receipt of an agency's determination. Prior to rendering its determination, the Commission may request that the parties submit whatever additional information or documentation it may deem necessary or it may direct that an investigation or hearing on the matter be conducted, as may be appropriate. If the Commisssion determines that agreement has not been complied with the noncompliance is not attributable to acts or conduct of the complainant, it may order such compliance or it may order that the compliant be reinstated for further processing form the point processing ceased under the terms of the settlement agreement. Complaints that alleged reprisal or futher discrimination violate

a settlement agreement shall be processed as individual complaints under 1613.214 rather that under this section.

(c) If an adjustment of the complaint is not arrived at, the complainant shall be notified in writing:

(1) Of the proposed disposition of the complaint,

(2) Of the right to a hearing, unless a recommended decision is issued under 1613.218(g), and decision by the agency head or designee if he/she notifies the agency in writing within 15 calendar days of the receipt of the notice that he/she desires a hearing, and

(3) Of the right to a decision by the head of the agency or designee without a hearing.

(d) If the complainant fails to notify the agency of his /her wishes within the 15 day period prescribed in

paragraph (c) of this section as the decision of the agency on the complaint when delegated the authority to make a decision for the head of the agency under those circumstances. When this is done, the Equal Employment Opportunity Officer shall transmit the decision by letter to the complainant and the representative which a shall inform the complainant of the right of appeal to the Commisssion and the time limit applicable to such an appeal and of the right to file a civil action as described in 1613.281. If the Equal Employment Opportunity Officer does not issue a decision under this paragraph, the complaint, together with the complaint file, shall be forwarded to the head of the agency or designee for decision under 1613.221.

7. Section 1613.218 is revised to read as follows:

1613.218 Hearing.

(a) Administrative Judge. The hearing shall be conducted by a Commission Administratrive Judge with an appropriate security clearance, except in instances where the Commission finds it is practical to delegate this responsibility to a complaints examiner or Admininstrative Judge from another agency who shall not be an employee of the agency in which the complaint arose. (for purpose of this paragraph, the Department of Defense is considered to be a single agency.) When the Commission does not provide the Administrative Judge, it will supply the agency with the name of an Administrative Judge from another agency with an appropriate security clearance who has been certified by the Commission as qualified to conduct a hearing under this section.

(b) Arrangement for hearing. The agency in which the complaint arose shall transmit the complaint file containing all the documents described in 1613.222 which have been acquired up to that point in the processing of the complaint, including the original copy of the investigative file (which shall be considered by the Administrative Judge in making a recommended decision on the complaint), to the Administrative Judge who shall reveiw the complaint file to determine whether further investigation is needed befor scheduling the hearing. When the Administrative Judge determines that further investigation is needed, the Administrative Judge shall remand the complaint to the Director of Equal Employment Opportunity for further investigation or arrange for the appearance of withnesses necessary to

supply the needed information at the hearing. The requirments of 1613.216 apply to any further investigation by the agency on the complaint. The Administrative Judge shall schedule the hearing for a convenient time and place.

(c) Conduct of hearing. (1)Attendance at the hearing is limited to persons determined by the Administrative Judge to have a direct connection with the complaint. Hearings are part of the investigative process and are thus closed to the public.

(2) The Administrative Judge shall conduct the hearing so as to bring out pertinent facts, including the production of pertinent documents. Rules of evidence shall not be applied strictly, but the Administrative Judge shall exclude irrelevant or unduly repetitious evidence. Information having a bearing on the

complaint or employment policies or practices relevant to the complaint shall be received in evidence. The complainant and the agency, or the representative of either shall be given the opportunity at the hearing to cross examine withnesses who appear and testify. Testimony shall be under oath or affirmation.

(d) Powers of Administrative Judge. In addition to the other powers vested in the Administrative Judge in accordance with this subpart, the Administrative Judge is authorized to :

(1) Administer oaths or affirmations;

(2) Regulate the course of the hearing;

(3) Rule on offers of proof and receive relevant evidence;

(4) Order the production of documents, records, comparative data, statistics, affidavits or the attendance

of withnessses;

(5) Limit the number of withnesses whose testimony would be unduly repetitious; and

(6) Exclude any person from the hearing for contumacious conduct or misbehavior that obstructs the hearing. In cases of repeated or flagrant contumacious conduct or misbehavior by a representative, the Administrative Judge may refer the matter to the Commission, and the Commission may , after giving the representative an opportunity to respond to the allegations of misconduct, suspend or disqualify the representative from further representational activity and report the misconduct to other appropriate authorities.

(e) If the complainant or agency in bad faith refuses or fail without adequate explanation to respond fully and in timely

fashion to requests made or approved by the Administrative Judge for documents, records, comparative data, statistics, affidavits, or the attendance of witnesses, and the information is solely failure may, in appropriate circumstances, cause the Administrative Judge:

(1) To draw an adverse inference that the requested information would have reflected unfavorably on the party refusing to provide the requested information;

(2) To consider the matters to which the requested information pertains to be established in favor of the opposing party;

(3) To exclude other evidence offered by the party failing to produce the requested information;

(4) To take such other actions as deemed appropriate.

(f) Witnesses at hearing. The Administrative Judge shall request any agency subject to this subpart to make available as witness at the hearing an employee requested by the complainant when the Administrative Judge determines that the appearance of an employee is necessary. The Administrative Judge may also request the appearance of an employee of any federal agency whose testimony he determines is necessary to furnish information pertinent to the complaint under consideration. The Administrative Judges shall give the complainant his reasons for the denial of a request for the appearance of employees as witnesses and shall insert those reasons in the record of the hearing. An agency to whom a request is made shall make its employees available as a witnesses at a hearing on a complaint when requested to do so by the

Administrative Judge and it is not administratively impracticable to comply with the request. When it is administratively impracticable to comply with the request for a witness, the agency to whom request is made shall provide an explanation to the Administrative Judge. If the explanation is inadequate, the Administrative Judge shall so advise the agency and it shall make the employee available as a witness at the hearing. If the explanation is adequate, the Administrative Judge shall insert it in the record of the hearing, provide a copy to complainant, and make arrangements to secure testimony from the employee at another time or through Written interrogatory. An employee of an agency shall be in a duty status during the time he/she is made available as a witness.

(g) If the Administrative Judge

determines that there are no issues of material fact, the Administrative Judge may , after giving notice to the parties and providing them an opportunity to respond in writing within 15 calendar days, issue a recommended decision without holding a hearing, The recommended decision will conform to 1613.218(i) in all other aspects.

(h)Record of Hearing. The hearing shall be recorded and transcribed verbatim. All documents submitted to, and accepted by, the Administrative Judge at the hearing shall be made part of the record of the hearing. IF the agency submits a document that is accepted, it shall furnish a copy of the document to the complainant. If the complainant submits a document that is accepted, the Administrative Judge shall make the documents available to the agency

representative for reproduction.

(i)Findings, analysis, and recommendations. The Administrative Judge shall transmit to the heard of the agency or designee:

(1) The complaint file(including the record of the hearing).

(2) The findings and analysis of the Administrative Judge with regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose, and

(3) The recommended decision of the Administrative Judge on the merits of the complaint, including recommended remedial action, where appropriate,with regard to the matter which gave rise to the complaint and the general environment out of which the complaint arose.

The Administrative Judge shall notify the complainant of the date on which this was

done. In addition, the Administrative Judge shall transmit, by separate letter to the Director of Equal Employment Opportunity, what ever finding and recommendations he considers appropriate with respect to conditions in the agency which do not bear directly on the matter which gave rise to the complaint or which bear on the general environment out of which the complaint arose.

8. Section 1613.219 is revised to read as follows:

1613.219 Relationship to grievance procedures.

(a) Allegations of discrimination on grounds of race, color, religion, sex, national origin, age or handicapping condition may be raised under a grievance procedure by employees in agencies that are subject to the provisions of 5 U.S.C. 7121(d) and who are covered by a

collective bargaining agreement that provides for allegations of discrimination to be raised in the negotiated grievance procedure. Allegations of discrimination by employees not covered by such a negotiated grievance procedure or by employees of agencies not subject to 5 U.S.C. 7121(d) shall be processed as complaints under 1613.214 *et seq.*

(b) In cases where a person is covered by a negotiated grievance procedure permitting allegations of discrimination, a person wishing to file a complaint or a grievance on a matter of alleged employment discrimination must elect the forum in which to pursue the matter: either the process described in this part or a negotiated grievance procedure. An aggrieved employee who files a grievance in writing with an agency whose negotiated agreement with an

employee organization permits the acceptance of grievance which allege discrimination prohibited by this subpart, may not thereafter file a complaint on the same matter under the provisions of this subpart irrespective of whether the grievance has raised an allegation of discrimination within the negotiated grievance procedure. Any such complaints filed after a grievance has been filed on the same matter shall be rejected without prejudice to the complainant's rights to proceed through the negotiated grievance process, including the complainant's right to request the Commission to review a final decision as provided in 5 U.S.C. 7121(d) and at 1613.231(b). The agency decision letter rejecting such a complaint shall advise the complainant of the right to appeal the agency decision to the Commission. An election, pursuant to this

paragraph, to proceed under this Part is indicated only by the filing of a formal complaint, in writing. Use of the pre-complaint process as described in 1613.213 does not constitute an election for the purposes of this section.

9. Section 1613.220 is amended by removing the word "monthly" in the first sentence of paragraph (c) and by revising paragraphs (b) and (d) to read as follows:

1613.220 Avoidance of delay.

* * * * * *

(b) The head of the agency or designee shall cancel a complaint if the complainant fails to prosecute the complaint without due delay by following the procedures for cancelling a complaint under 1613.215.

* * * * *

(d) When the Administrative Judge has submitted a recommended decision it shall

become a final decision binding on the agency 60 calendar days after the receipt of the complete complaint file and the recommended decision by the agency unless the agency has already issued a final decision. In such event, the agency shall so notify the complainant of the decision and furnish to him a copy of the findings, analysis, and recommended decision of the Administrative Judge under 1613.218(i) and a copy of the hearing record and right to appeal to the Commission and time limits applicable to such an appeal and of the right to file a civil action as described in 1613.281. The agency shall provide the Administrative Judge with a copy of its final decision on each complaint on which a recommended decision has been issued.

10. Section 1613.221 is revised to read as follows:

1613.221 Decision by head of agency or designee.

(a) The head of the agency or designee shall make the decision of the agency on a complaint bases on the preponderance of evidence in the complaint file. A person designated to make the decision for the head of the agency shall be one who is fair, impartial, and objective.

(b)(1) The decision of the agency shall be in writing, shall reflect the date of its issuance, and shall be transmitted to the complainant and his or her representative either by certified mail, return receipt requested, or by any other method which enables the agency to show the date of receipt.

(2) When the Administrative Judge has issued a recommended decision on the complaint under 1613.218(g) or (i)(3), the

decision letter shall transmit a copy of such recommended decision and a copy of the hearing record if a hearing was held. The decision of the agency shall adopt, reject, or modify the decision recommended by the Administrative Judge. If the decision is to reject or modify the recommended decision, the decision letter shall set forth the specific reasons in detail for rejecting or modifying the findings of fact or conclusions of law made by the Administrative Judge.

(3)When there has been no hearing and no recommended decision under 1613.218(g), the decision letter shall set forth the findings, analysis, and decision of the head of the agency or his designee.

(c)The decision of the agency shall require any remedial action authorized by law determined to be necessary or desirable to resolve the issue of

discrimination and to promote the policy of equal opportunity, whether or not there is a finding of discrimination. When discrimination is found, the agency shall:

(1) Advise the complainant and his or her representative that any request for attorney's fees or costs must be documented and submitted within 20 calendar days of receipt.

(2)Require remedial action to be taken in accordance with 1613.271.

(3) Review the matter giving rise to the complaint to determine whether disciplinary action is appropriate and

(4) Record the basis for its decision to take, or not to take, disciplinary action but this decision shall not be recorded in the complaint file.

(d) When the final agency decision provides for an award of attorney fees or costs, the amount of these awards shall be

determined under 1613.271(c). In the unusual situation in which the agency determines not to award attorney's fees or costs to a prevailing complainant, the agency shall set forth in its decision the specific reasons for denying the award.

(e) The decision letter shall inform the complainant of his or her right to appeal the decision of the agency to the Commission, and shall include the text of 1613.233(a) or (b), as appropriate. The decision letter shall also inform the complainant of his or her right to file a civil action in accordance with 1613.281 and of the time limits applicable to such an appeal.

11. Section 1613.222 is revised to read as follows:

1613.222 Complaint file.

The agency shall establish a complaint file. Except as provided in

1613.221(c) , this file shall contain all documents pertinent to the complaint.

(a) The complaint file shall include copies of:

(1) The notice of the Equal Employment Opportunity Counselor to the aggrieved person under 1613.213(a);;

(2) The written report of the Equal Employment Opportunity Counselor on what ever precomplaint counseling efforts were made with regard to the complainant's case;

(3) The complaint;

(4) The investigative file,

(5) If the complaint is withdrawn by the complainant, a written statement of the complainant or representative to that effect;

(6) If adjustment of the complaint is arrived at under 1613.217, the written record of the terms of adjustment;

(7) If no adjustment of the complaint is arrived at under 1613.217, a copy of the letter notifying the complainant of the proposed disposition of the complaint and of the right to a hearing and documentation of the attempt to adjust the complaint;

(8) If decision is made under 1613.217(d), a copy of the letter to the complainant transmitting that decision,

(9) If a hearing was held, the record of the hearing , together with the Administrative Judge's findings, analysis and recommendations, if any, made to the head of the agency or designee,

(10) If the Director of Equal Employment Opportunity is not the designee, the recommendations, if any, made by the Director to the head of the agency or designee,

(11) If decision is made under

1613.221, a copy of the letter transmitting the decision of the head of the agency or designee, and.

(12) Proof of the date of receipt of final agency decision, as required under 163.221(b)(1).

(b) The complaint file shall not contain any document that has not been made available to the complainant or the complainant's designated physician under 5 CFR 294.401.

Rule 52. Findings by the Court

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not

be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule

41(b).

(b) Amendment. Upon motion of a party made not later than 10 days after entry of judgement the court may amend the findings or make additional findings and may amend the judgement accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafte~ be rai ed whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion

for judgment.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 29, 1985, eff. Aug. 1, 1985.)

CERTIFICATE OF SERVICE

I, Dr. Lih Y. Young, hereby certify that on this 16th day of April, 1991, I caused to mail by first class, postage prepaid, copies of the foregoing "Petition for Writ of Certiorari," together with appendix, to the following:

Solicitor General
Department of Justice
Washington, DC 20530

Mr. Daniel Bensing, Esq.
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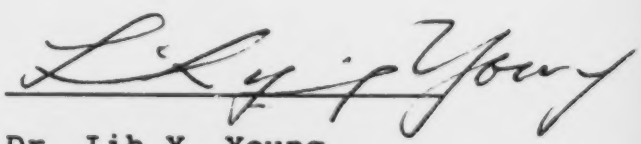

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